

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

What is the liability of the Kansas Workers Compensation Fund (Fund)? Specifically, is the respondent financially able to pay the compensation award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant, a grinder for respondent, was injured on May 25, 2004, when a slab of marble was dropped on his right hand. His right middle finger was injured when it was smashed by the marble. Claimant was initially treated at the Via Christi Regional Medical Center emergency room. He later was referred to Mark S. Dobyns, M.D., and J. Mark Melhorn, M.D., for treatment. Claimant and the Fund have stipulated that, in the event the Fund is found liable, claimant has an 8 percent functional impairment to the right hand. This stipulation applies only to the dispute between claimant and the Fund. It has no effect on claimant's litigation against respondent.

The dispute in this matter centers around the liability of the Fund. The parties agree that on the date of accident, respondent's insurance carrier was unknown. The Fund was joined pursuant to K.S.A. 44-532a, which states in part:

(a) If an employer has no insurance to secure the payment of compensation, . . . and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical

compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. . . .

(b) The commissioner of insurance, acting as administrator of the workers compensation fund, shall have a cause of action against the employer for recovery of any amounts paid from the workers compensation fund pursuant to this section.

The ALJ found that, while respondent remains in business and is able to pay small bills, respondent lacks the resources to pay the total amount of medical bills and permanent partial disability compensation due to claimant. As respondent was found by the ALJ to be both uninsured and financially unable to pay benefits to claimant, the Fund was ordered to pay.

The Fund argues that respondent is able to pay the benefits ordered herein. Craig Bauer, respondent's sales manager, testified at the August 31, 2004 preliminary hearing that the company had the financial means to pay the medical bills for claimant's treatment.

However, Michael Ray, respondent's accountant, who testified by deposition on October 12, 2005, stated that respondent only had petty cash on hand. While Mr. Ray stated that paying \$2,000.00 to \$3,000.00 in medical bills was possible, he acknowledged that respondent could pay nothing as of the date of his deposition, as respondent had no available money. He agreed that, with possible collections toward the end of the week, payments were possible. But he also testified that respondent's liabilities outweighed its assets, and that on the day of his deposition, respondent had a net worth of zero. The Board finds it disconcerting that, while Mr. Ray was served with a Deposition Subpoena Duces Tecum, he attended the deposition with no financial information related to respondent's business. Nevertheless, this omission was not pursued by any party, and the Board is limited to the record presented by the parties.

The Fund argues that respondent has the ability to pay benefits in this matter, but simply refuses to pay. Claimant argues that he has proven respondent is very limited in its ability to pay. The question distills to how much evidence of an employer's inability to pay must exist before the Fund can be ordered to pay benefits. In *Silicone*,³ the Kansas Supreme Court was asked to construe K.S.A. 44-532a. As stated in *Silicone*, the Fund, which was established in 1974,

. . . was made liable for three classifications of payments: (1) awards to handicapped employees; (2) benefits to an employee who is unable to recover benefits from such employee's employer under K.S.A. 44-532a (the instant

³ *Workers Compensation Fund v. Silicone Distributing, Inc.*, 248 Kan. 551, 809 P.2d 1199 (1991).

situation); and (3) reimbursement of employers or insurance carriers for preliminary awards later found to have been unwarranted. K.S.A. 44-566a(e).⁴

The first of these, the awards to handicapped employees, was omitted by the Kansas legislature effective for injuries on or after July 1, 1994.⁵

The Court, in *Silicone*, noted that,

A report by the National Commission on State Workmen's Compensation Laws recommended that the states establish procedures "to provide benefits to employees whose benefits are endangered because of an insolvent carrier or employer, or because an employer fails to comply with the law mandating the purchase of workmen's compensation insurance."⁶

The Kansas Court of Appeals, in *Helms*,⁷ addressed the question as to who has the burden of proving an employer's inability to pay. The Appellate Court cited *Silicone* as support for the position that the claimant does not bear that burden. The court stated, "[w]e have been cited to no cases specifically requiring the claimant to prove the employer to be unable to pay benefits."⁸

The ALJ found the Fund liable for the award. The Fund, in its brief to the Board, stated:

If the Award below is upheld, it would create a precedent for businesses without insurance and with the ability to pay their bills, although they may have some financial struggles. By simply failing to cooperate with the laws and court orders, employers could simply consider the Fund their "insurance" and give priority to other financial obligations, leaving their workers compensation liabilities for the government to assume. It would create a tremendous incentive for businesses to shirk their insurance obligations.⁹

⁴ *Id.* at 558.

⁵ K.S.A. 44-567(a)(1) (Furse 1993).

⁶ *Silicone* at 559.

⁷ *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

⁸ *Id.* at 313.

⁹ Fund's brief at 13 (filed Sept. 1, 2006).

However, what the Fund ignores is the fact that it has the legal right to request the Insurance Commissioner to pursue a cause of action against the employer for monies paid by the Fund.¹⁰ Thus, this “tremendous incentive” the Fund argues about is really only a delay of liability on the part of an employer who has the ability to pay. The legislature obviously intended that the financial obligation for such delay be borne by the state, rather than an injured worker.

The Board, after considering the testimony of both Mr. Bauer and Mr. Ray, finds that the respondent in this matter is financially unable to pay compensation to the claimant as required by the Workers Compensation Act, and the award of benefits in favor of the claimant and against the Fund should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 26, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Accent Stone Holdings, Respondent, 442 South Ellis, Wichita, Kansas 67211
Alisa Ehrlich Nickel, Attorney for the Fund
Nelsonna Potts Barnes, Administrative Law Judge

¹⁰ K.S.A. 44-532a(b).